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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 438

A. B. PHILLIPS, Executive Director, Employment Security Commission of Alaska,
Petitioner,

vs.

FIDALGO ISLAND PACKING CO., CLARA WILSON,
Respondents.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

J. GERALD WILLIAMS,
Attorney General of Alaska,
EDWARD A. MERDES,
Assistant Attorney General,
Attorneys for the Alaska Employment Security Commission.

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1. By refusing to recognize and apply the prevailing doctrine of simultaneous repeal and re-enactment which would compel the recognition of a continuing commission, the Circuit Court below adversely decided an issue of vital importance to the people of the Territory of Alaska, which is in direct conflict with: (a) applicable decisions of this court, (Bear Lake, et al. v. Garland, et al., (supra), Posadas v. National City Bank, (supra); (b) a decision of the Court of Appeals for the Second Circuit, Commissioner of Internal Revenue v. Emery, 62 F.2d 591, 592; and (c) a prior decision of its own, Goublin v. United States, 261 Fed. 5, 10-11 8

2. The Court of Appeals, by affirming the judgment of the trial court has in effect upheld the District Court's holding that: (a) Regulation No. 10 is void; (b) that plaintiff and intervenor need not exhaust an available administrative remedy; and (c) that plaintiff and intervenor may be irreparably damaged by enforcement of Regulation No. 10; thus the court below has decided questions of extreme importance to the Territory in a way that is in conflict with applicable territorial and general law 19

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PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

The Attorney General of Alaska, representing the Employment Security Commission of Alaska, prays that a writ of certiorari issue to review the judgment entered in this case on June 21, 1956, by the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW.

The opinion of the District Court for the District of Alaska is reported at 120 F. Supp. 777. (Appendix "A".) The initial opinion of the Court of Appeals is found at 230 F. 2d 638. (Appendix "B".) The Court of Appeals' opinion disposing of the petition for rehearing is not as yet reported but is appended hereto. (Appendix "C".)

JURISDICTION.

The judgment of the Court of Appeals was entered on June 21, 1956. (Appendix "C".) The jurisdiction of this Court is invoked under Section 1254 of the New Federal Judicial Code. (28 U.S.C.A. 1254.)

QUESTIONS PRESENTED.

(1) Did the Court of Appeals err by refusing to recognize and apply the doctrine of simultaneous repeal and re-enactment as enunciated and laid down by this Court in *Bear Lake, et al. v. Garland, et al.*, 164 U.S. 1, 11-12 and *Posadas v. National City Bank*, 296 U.S. 497, 505?

(2) Did the Court of Appeals err in affirming that portion of the decision of the District Court holding that amended Regulation No. 10 was promulgated without authority and was in non-compliance with its enabling statute?

(3) Did the Court of Appeals err in affirming that portion of the decision of the District Court holding that the doctrine of exhaustion of administrative remedies has no application herein, notwithstanding the specific requirement of the Alaska statute, and of the general law, that persons allegedly aggrieved shall exhaust their administrative remedies before resort is had to the Court?

(4) Did the Court of Appeals err in affirming that portion of the District Court's decision holding that the failure of the Commission to pass upon the seasonal status of *all* Alaskan employers resulted in allowing the payments of benefits to all unclassified seasonal employees, thus causing an unnecessary drain on Alaska's Unemployment Compensation Trust Fund, thereby endangering its solvency, all to the alleged irreparable damage of plaintiff (appellee) and intervenor?

(5) Did the Court of Appeals, in substantiating its decision upon unidentified legislation developments, occurring subsequent to trial and after argument in the Appellate Court there having been no reference by counsel to any such legislation at any time, so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

STATUTES.

The pertinent portions of the statutes involved are set out in Appendices "D", "E", "F", "G", "H" and "I".

STATEMENT.

On June 29, 1953, Benefit Regulation No. 10 (R. 9-11) was issued by the Executive Director of the Alaska Employment Security Commission pursuant to a previous delegation of authority by the Commission. In substance, this Regulation specified the particular seasonal periods during which unemployment benefits would be payable to employees of the salmon canning industry.

Regulation No. 10 had as its purpose and effect to restrict the payment of unemployment compensation to salmon cannery employees for only those days of unemployment occurring during the regular summer canning season. In other words, since in Alaska the catching and canning of salmon is a seasonal activity, the regulation prohibited the payment of benefits during the fall, winter and early spring seasons when, due to the absence of salmon in Alaskan waters, it is impossible to catch and can the same.

In late summer of 1953 (July 30), the Fidalgo Island Packing Company filed suit to enjoin the enforcement of said Regulation No. 10.

On May 7, 1954 and following trial, the District Court issued its written opinion holding, among other things, that (R. 42-54):

(1) Benefit Regulation No. 10 was issued without authority and was therefore void.

(2) The doctrine of exhaustion of administrative remedies had no application herein.

(3) Section 7 of Chapter 99, Session Laws of Alaska 1953 required the Unemployment Com-

pensation Commission to determine the seasonal status of every employer in Alaska, and that its failure to do so, while classifying the salmon cannery employers under Amended Regulation No. 10, was discriminatory and hence the regulation was void.

(4) That the failure to classify all other Alaska employers who were allegedly seasonal, caused a serious drain on the unemployment fund and that this "threatened injury" was "irreparable in character".

Thereafter, judgment was entered permanently enjoining the defendant, or any of his agents, from enforcing the regulation. (R. 65-67.) The District Court, in lieu of requiring a supersedeas bond by the Commission and pursuant to stipulation, impounded by court order the sum of $650,000.00 representing benefit payments that would be disbursed if the validity of Amended Regulation No. 10 was not sustained on appeal. (R. 72-75.)

On June 11, 1954, the Attorney General filed a notice of appeal from the trial court's judgment. (R. 67.)

On September 13, 1955, the Court of Appeals for the Ninth Circuit issued its per curiam opinion. (Appendix "B".) After stating that the case was "extremely confusing", in substance, it held, without citing a single authority, case or statute, that:

(1) This amended regulation was supposedly issued by and under the authority of the Em-

ployers Security Commission which was no longer in existence at the date of the issuance thereof.

(2) "A regulation cannot be issued by a Commission which is no longer in existence. Any delegation of authority by the old Commission became null and void when the body itself was abolished."

(3) There was "no doubt of the validity of the result" because of "other legislative developments in this field since the cause was tried."

On October 13, 1955, the Attorney General on behalf of the Commission, filed a Petition for Rehearing. The basis for the petition was that:

(1) The Alaska Employment Security Commission was, in fact, in existence at the time Regulation No. 10 was promulgated;

(2) The doctrine of simultaneous repeal and re-enactment as announced by this Court in *Bear Lake, et al., v. Garland, et al.,* (supra) and *Posadas v. National City Bank,* (supra) was controlling and required the Court to find that a continuity of Commissions existed;

(3) The plaintiff and intervenor (appellees) made no attempt to exhaust their administrative remedies;

(4) The complete failure of plaintiff and intervenor (appellees) to show that they were irreparably damaged;

(5) The crippling effect of the District Court's decision and the Court of Appeals' af-

firmance thereof, on the Employment Security program in Alaska; and

(6) No subsequent legislative enactments affected the issues in this case.

On June 21, 1956, the Court of Appeals issued its written opinion denying this petition. (Appendix "C".) The Court, held, again without citing a single authority, that:

(1) The jurisdiction of "* * * the old commission over the subject matter had expired by abolition of the agency."; thus

(2) "The delegated power to the Executive director of the old commission expired when it went out of existence.",

(3) The Executive Director's "purported action in the interim between the expiration of his delegation of power by the old commission and the organization of the new commission was void, not voidable, because no body had jurisdiction of the subject matter at the time and he had no delegated authority to act in the premises.",

(4) "The fact that the acts abolishing one body and creating another were passed simultaneously is without significance.", and

(5) "* * * an emergency has obviously been prevented by federal legislation."

REASONS FOR GRANTING THE WRIT.

1. **BY REFUSING TO RECOGNIZE AND APPLY THE PREVAILING DOCTRINE OF SIMULTANEOUS REPEAL AND RE-ENACTMENT WHICH WOULD COMPEL THE RECOGNITION OF A CONTINUING COMMISSION, THE CIRCUIT COURT BELOW ADVERSELY DECIDED AN ISSUE OF VITAL IMPORTANCE TO THE PEOPLE OF THE TERRITORY OF ALASKA, WHICH IS IN DIRECT CONFLICT WITH: (a) APPLICABLE DECISIONS OF THIS COURT, (Bear Lake, et al. v. Garland, et al., (supra), Posadas v. National City Bank, (supra); (b) A DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT, Commissioner of Internal Revenue v. Emery, 62 F.2d 591, 592; AND (c) A PRIOR DECISION OF ITS OWN, Goublin v. United States, 261 Fed. 5, 10-11.**

In its opinion disposing of the Commission's Petition for Rehearing, the Court of Appeals stated as follows:

> "The fact that the acts abolishing one body and creating another were passed simultaneously is without significance." (App. C.)

This brief statement neatly epitomizes what we believe is the commission of serious error and therefore, constitutes one of the primary reasons we are asking the Supreme Court to review. We contend, contrary to the Court of Appeals herein, that where there is an express repeal of an existing statute, [Chapter 82, SLA 1953 repealed Section 51-5-10 ACLA 1949], and an immediate re-enactment of the same statute, with minor modifications, [Chapter 83, SLA 1953 re-enacted Section 51-5-10 ACLA 1949], the re-enactment neutralizes the repeal and the old law is continued in force, so that offices are not lost, and power is not taken away. *Goublin v. United States*, (supra), 261 Fed. 5, 10-11 and cases and authority cited therein.

Amended Regulation No. 10[1] was issued by the Executive Director pursuant to an express delegation of authority to promulgate regulations when the Commission was not in session. Such a delegation by the Commission to the Director was expressly permitted by Section 51-5-1 (f) ACLA 1949 which read as follows:

> "(f) 'Commission' means the Unemployment Compensation Commission established by this Act *or any person to whom this Commission may delegate its powers and duties.*" (Emphasis added.)

Pursuant to the above statute, the Commission formally promulgated Regulation No. 16:

> "Regulation 16, *wherein power was granted to the Director to make rules and regulations* when the Commission is not in session, was adopted. Such rules and regulations are to be in effect in the regular procedure until such time that the Commission at their next meeting either approves or disapproves such rules and regulations." (R. 161 and 162.) (Emphasis added.)

On June 29, 1953, the Executive Director, in behalf of the Commission and in accordance with the above delegation of authority, issued the crucial Amended Regulation No. 10, which regulation prescribed seasonal periods for cannery employers and thus restricted the payment of unemployment benefits during these prescribed seasonal periods.

The Court of Appeals held that the Executive Director had no authority to issue Regulation No. 10

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[1]Regulation No. 10 is set forth in full in Appendix "J".

for the reason that "the delegated power to the Executive Director of the old Commission expired when it went out of existence." (App. "C".)

A comparison of the repeal statute (which created the original Commission) and the re-enacted statute is set forth in the table below:

Section 51-5-10 ACLA 1949 (the repealed statute).	Chapter 83, SLA 1953 (the statute re-enacted simultaneously with the repealed one).
"(a) *Organization.* There is hereby created a Commission to be known as the Unemployment Compensation Commission of Alaska. The Commission shall consist of three members, who shall be appointed by the Governor, by and with the consent of the Legislature, as soon as possible after the passage and approval of this Act and thereafter when any vacancy occurs in its membership. During his term of membership on the Commission no member shall serve as an officer or committee member of any political party organization, and not more than two members of the Commission shall be members of the same political party. Each member shall hold office for a term of six years, except that:	"Section 1. There is hereby created a commission to be known as the Employment Security Commission of Alaska. The Commission shall consist of four members, who shall be appointed by the Governor, by and with the consent of the legislature, in joint session of both houses, as soon as possible after passage and approval of this Act. Members of the Commission shall be residents of the Territory of Alaska and citizens of the United States, over the age of twenty-one years. Not more than two members of the Commission shall be of the same Political Party. Two members shall be representative of industry or management and two shall be representative of labor. Each member shall hold office for a term of six years, except that:
(1) any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was ap-	(1) Any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was ap-

Section 51-5-10 ACLA 1949 (the repealed statute).	Chapter 83, SLA 1953 (the statute re-enacted simultaneously with the repealed one).
pointed shall be appointed for the remainder of such term; and	pointed, shall be appointed for the remainder of that term; and if a vacancy occurs at a time when the legislature is not in session, through death, resignation, removal or disqualification, under this Act, a new member shall be appointed by the Governor to fill the vacancy who shall have the qualifications herein prescribed and who shall hold office for the remainder of the term for which his predecessor was appointed; and
(2) the term of office of the members first taking office after the date of enactment of this Act shall expire, one February 1, 1939, one February 1, 1941, and one February 1, 1943. The members of the Commission shall be Territorial officers and before entering upon the duties of their office shall take the oath of office prescribed for Territorial officers. The Governor may at any time, after notice and hearing, remove any Commissioner for gross inefficiency, neglect of duty or malfeasance in office.	(2) The terms of office of the members first taking office after the date of the enactment of this Act shall begin on the date of their appointment and shall expire, one on February 1, 1955, one on February 1, 1957, one on February 1, 1959 and one on February 1, 1961. The members of the Commission shall be Territorial officers, and before entering upon the discharge of their duties, shall take such oaths of office as are prescribed for Territorial officers. The Governor may, at any time, after notice and hearing, remove any Commissioner for gross inefficiency, neglect of duty, malfeasance in office, or commission of a crime.
Upon the expiration of the term of a member the Governor shall submit the name of his	Upon the expiration of the term of a member, the Governor shall submit the name of a suc-

Section 51-5-10 ACLA 1949 (the repealed statute).	Chapter 83, SLA 1953 (the statute re-enacted simultaneously with the repealed one).
successor for confirmation by the Legislature then in session; if the Governor fail to submit such name the incumbent shall continue to hold office and shall continue to perform the duties thereof until his successor shall have been appointed and his appointment confirmed by the Legislature as in this Section provided, and no recess or interim appointment shall be made in such case.	cessor for confirmation by the legislature then in session; if the Governor does not submit such name, the incumbent shall continue to hold office and to perform the duties thereof until his successor shall be appointed and confirmed by the legislature, as in this section provided, and no recess or interim appointments shall be made in such cases.
(3) The Commission shall appoint a director who shall be the chief executive of the Commission, whose compensation shall be Five Thousand Two Hundred and Fifty Dollars ($5,250.00) per annum, payable in equal monthly installments; he shall be appointed for a term of four years and may be removed at the pleasure of the Commission. No person shall be appointed Director unless he is a citizen of the United States, a resident of this Territory and has been such resident at least five years immediately preceding his appointment. The Director shall be subject to the supervision and direction of the Commission and shall perform such duties as the Commission may assign to him.	(3) The Commission shall appoint a director who shall be the chief executive of the Commission, whose compensation shall be Eight Thousand Five Hundred Dollars ($8,500.00) per annum, payable in equal monthly installments; he shall be appointed for a term of four years and may be removed at the pleasure of the Commission. No person shall be appointed Director unless he is a citizen of the United States, a resident of this Territory and has been such resident at least five years immediately preceding his appointment. The Director shall be subject to the supervision and direction of the Commission and shall perform such duties as the Commission may assign to him.
(b) *Compensation of Commissioners.* One of the members	(b) One of the members of the Commission so appointed

Section 51-5-10 ACLA 1949 (the repealed statute).	Chapter 83, SLA 1953 (the statute re-enacted simultaneously with the repealed one).
of the Commission so appointed shall be the chairman of the Commission. The members of the Commission shall not receive any fixed salary but shall be paid at the rate of Ten Dollars ($10.00) per day plus necessary expenses while engaged in the actual performance of their duties but no commissioner shall in any event receive more than One Thousand Dollars ($1,000.00) salary in addition to expenses for any calendar year. The salaries of all commissioners shall be paid from the unemployment compensation administration fund. The chairman of the Commission shall be designated by the Governor.	shall be chosen by all members as Chairman of the Commission. Members of the Commission shall be reimbursed for actual travel expenses and shall receive a per diem allowance for each day that they are away from home in connection with their official duties in carrying out the purpose of this Act. The reimbursement of all Commissioners shall be from the Employment Security Commission administration fund.
(c) *Quorum.* Any two Commissioners shall constitute a quorum. No vacancy shall impair the right of the remaining Commissioners to exercise all of the powers of the Commission."	(c) Any three Commissioners shall constitute a quorum, and no vacancy shall impair the rights of the remaining Commissioners to exercise all the powers of the Commission."

The most cursory examination of these two statutes immediately discloses that they are virtually identical save for minor modifications and the enlarging of the commission to include one additional member. Indeed the trial Court recognized this identity by stating:

> "Section 51-5-10 A.C.L.A., 1949, was repealed by Chapter 82, S.L.A. 1953, effective June 26, 1953. The effect of this was the abolition of the

> Commission. Chapter 83, S.L.A. 1953, effective June 26, however, *substantially re-enacted the provisions repealed.* * * *" (R. 45.) (Emphasis added.)

House Bill No. 128, which became Chapter 82, (the repealing statute) and House Bill No. 129, which became Chapter 83 (the re-creating statute) were passed within minutes of one another and became law on the same day.[2]

Since these two statutes were, for all practical purposes, repealed and simultaneously re-enacted, it is our contention that the Court below erred in refusing, after having been twice urged to do so, to apply the doctrine of simultaneous repeal and re-enactment, as enunciated by this Court in *Bear Lake, et al. v. Garland, et al.,* (supra), and *Campbell v. California,* 200 U.S. 87, 92; *Posadas v. National City Bank,* (supra).

If the Court below had applied the *Bear Lake* rule then it would have been compelled to hold that the setting aside of the original law creating the Commission and the concurrent enactment of a new statute, adding a member, did not in any manner vitiate the delegated authority of the executive director to issue rules and regulations, including Regulation No. 10, while the commission was not in session.[3]

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[2]See 1953 Alaska Senate Journal, pages 923, 924; 60th Day, Appendix "K".

[3]It is undisputed that the Commission was not in session on June 29, 1953, the date amended Benefit Regulation No. 10 was issued.

The trial judge summarily rejected Fidalgo Island's argument that the executive director's authority had expired and there was no commission in existence with whom an administrative appeal could have been lodged. The following is found in the District Court's opinion:

> "* * * the plaintiff and intervenor contend that the authority delegated to the defendant expired with the abolition of the Commission by Chapter 82, that there was no Commission to appeal to until August 6th, when it met for the first time, and that in any event an appeal would have been futile because, when the new Commission finally met in October, it became deadlocked by reason of a tie vote on every major issue and, hence, was unable to function." (R. 48.)
>
> "The last contention may be disposed of by the observation that the application of the doctrine does not depend on what may be said in retrospect. Here, as in analogous situations, diligence is the criterion. *The remaining contentions are in my opinion untenable for, apparently, the new members of the Commission had qualified,*[4] and in any event an appeal may be prosecuted although the appellate tribunal is not in session." (R. 48.) (Emphasis added.)

With this statement of the trial Court, we wholeheartedly agree. It recognized, unlike the Court of Appeals, that there was no period during which there

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[4]See Appendix "L" or Defendant's Exhibit "C" (R. 63). This "Certification of Appointment" by the Secretary of Alaska discloses that all four members of the Commission were appointed on June 24, 1953—five days *before* Regulation No. 10 was issued.

was any alleged non-existence of a Commission. Furthermore, there is an implicit recognition throughout the trial judge's opinion of the executive director's authority to act in behalf of an existing commission. But, the trial judge held that the director exercised a power delegated to him non-delegable in nature and that the regulation did not comply with the enabling act. (R. 49-50.)

Both "per curiam" opinions of the Court of Appeals disclose that its decision is predicated upon the erroneous conclusion that there was no commission in existence at the time Regulation No. 10 was promulgated. The Court of Appeals' ruling on this point is in direct conflict with this Court's holding in *Bear Lake, et al. v. Garland, et al.,* (supra), and *Posadas v. National City Bank,* (supra).

In the *Bear Lake* case at 164 U.S., page 12, this Court clearly stated:

> "* * * As the provisions of the new act took effect simultaneously with the repeal of the old one, the court held that the new one might more properly be said to be substituted in the place of the old one, and to continue in force, with modifications, the provisions of the old act, instead of abrogating or annulling them and re-enacting the same as a new and original act."

In accord:

Bingaman v. Golden Eagle, 297 U.S. 626, 628;
Campbell v. California, 200 U.S. 87, 92;
Commissioner of Internal Revenue v. Emery, 72 F. 2d 591, 592 (2d Circuit);

Goublin v. United States, 261 Fed. 5, 10-11 (9th Circuit);

Sutherland on Statutory Construction, 3rd Ed., Section 2035, page 513;

50 *Am. Jur., Statutes*, Section 533;

82 *C.J.S. Statutes*, Section 295.

The Court below in the *Goublin* case, 261 Fed. at page 11 quotes with approval, Professor Sutherland's statement of the rule:

> " 'Where there is an express repeal of an existing statute, and a re-enactment of it at the same time, * * * the re-enactment neutralizes the repeal so far as the old law is continued in force. It operates without interruption where the re-enactment takes effect at the same time. * * * Offices are not lost, corporate existence is not ended, inchoate statutory rights are not defeated, a statutory power is not taken away, * * * by such repeal and re-enactment of the law on which they respectively depend.' "

The reasoning behind such a rule can be no better exemplified than by pointing out the resulting absurdity if it is *not* applied herein. Between the time the time the repealing statute became effective (June 26, 1953) and the time the newly appointed commission first met, (August 6, 1953—R. 59), the executive director, in addition to promulgating Regulation No. 10, performed numerous other important duties and functions, authority for which emanated from previous delegation of power from the Commission which Commission was allegedly abolished by Chapter 82. Thus,

his authority to sign travel vouchers, sign benefit checks, conduct administrative appeals and hearings, approve all purchase requisitions, and in general, supervise the operation of the agency, can all be traced back to prior delegations by the Commission.[5]

If the Court of Appeals' conclusion is to be upheld, it can readily be seen that all of the actions of the director taken in the interim period are void. It is compelling and apparent that one of the primary reasons for the judicial recognition of the rule of simultaneous repeal and re-enactment is to obviate this type of chaos. Every Federal, State and Territorial agency operating under the guidance of a commission will be jeopardized whenever all members of a commission resign or an attempt is made to modify or improve original legislation creating such bodies.

As a result of refusing to apply the simultaneous repeal and re-enactment rule to this case, the Court below not only decided an important territorial issue in conflict with settled decisions of the Court but has jeopardized the solvency of the Territory's Unemployment Compensation Trust Fund by authorizing the disbursement therefrom of $650,000.00 in impounded funds. (R. 72.)

The impact of the Court of Appeals' denial to apply this rule cannot be minimized. As a result of the issu-

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[5]Employment Security Commission, Alaska, Fiscal Regulation No. 1, effective June 24, 1953, Section 1(a) and 4 thereof: Section 51-5-9(c)—authorized the Commission or authorized agent to sign benefit checks; Fiscal Regulation No. 4, Section 3, effective March 4, 1950—required approval of Executive Director on all purchase requisitions.

ance and enforcement of Regulation No. 10, $650,000.00 has been retained in Alaska's badly depleted Unemployment Compensation Trust Fund a substantial portion to which monies "but for" the regulation would have been and—if the Court of Appeals' decision is upheld—will be disbursed to seasonal cannery employees for unemployment occurring during the seasons when the canning of salmon is impossible.

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2. THE COURT OF APPEALS, BY AFFIRMING THE JUDGMENT OF THE TRIAL COURT HAS IN EFFECT UPHELD THE DISTRICT COURT'S HOLDING THAT: (a) REGULATION NO. 10 IS VOID; (b) THAT PLAINTIFF AND INTERVENOR NEED NOT EXHAUST AN AVAILABLE ADMINISTRATIVE REMEDY; AND (c) THAT PLAINTIFF AND INTERVENOR MAY BE IRREPARABLY DAMAGED BY ENFORCEMENT OF REGULATION NO. 10; THUS THE COURT BELOW HAS DECIDED QUESTIONS OF EXTREME IMPORTANCE TO THE TERRITORY IN A WAY THAT IS IN CONFLICT WITH APPLICABLE TERRITORIAL AND GENERAL LAW.

As stated heretofore, the Court of Appeals did not decide the case on the same grounds relied on by the trial Court. Wherein the Court of Appeals decided on the single issue of the alleged non-existence of a commission, the district judge resolved the case, to his satisfaction, on the merits. (R. 48.) The following are the grounds he advanced in support of his conclusion that Regulation No. 10 was invalid:

(a) That in issuing Regulation No. 10, on behalf of the Commission, the executive director exercised a power that is discretionary and nondelegable in nature. (R. 49-50.)

(b) That Regulation No. 10 by only classifying the salmon industry as seasonal ignored the mandate of the law that *all* employing units must be classified as seasonal or non-seasonal and its failure to do so was discriminatory. (R. 50-51.)

(c) That since under no circumstances could the regulation be upheld, the plaintiff's failure to exhaust its administrative remedy is immaterial since that doctrine is not applicable when a void regulation is involved. (R. 51-52.)

(d) That the failure to classify employers in the construction industry as "seasonal" has caused a depletion of the unemployment trust fund by the payment of compensation to employees of that industry which in turn require greater contributions by, and the loss of credit ratings to, the plaintiff, as an employer, and decreased benefits to the intervenor, as an employee. (R. 52.)

Petitioner submits in brief outline, the following arguments in repudiation of the premises upon which the District Court rested its opinion:

In Re (a): That in issuing Regulation No. 10, on behalf of the Commmission, the executive director exercised the power that is discretionary and non-delegable in nature.

I.

The Executive Director Was Duly Delegated the Authority by the Employment Security Commission to Promulgate Regulation No. 10.

Implicit in the trial Court's ruling is the recognized fact that the executive director was acting on behalf of an existing commission. However, it was the district judge's view that the power exercised by the director was of a discretionary nature and non-delegable. (R. 50.) With the last part of the above sentence, the petitioner wholeheartedly disagrees.

Section 51-5-1 (f) ACLA 1949, expressly permitted the Commission to delegate its powers, placing no limitation thereon. Thus, the only question to be discussed hereunder is whether the power re-delegated to its Executive Director was properly exercised.

Section 7 of Chapter 99, SLA 1953 is the enabling statute that prescribed the standards for a seasonality regulation and which authorized the issuance of such a regulation by the "Commission".

In view of the Commission being authorized without limitation to delegate "its powers and duties", including the issuance of regulations, and having in fact delegated such power to the executive director, the word "director" can be substituted whenever the word "Commission" appears in Section 7 of Chapter 99, SLA 1953. The reason for allowing such a substitution is readily apparent. If the legislature has the power to authorize a commission to promulgate a seasonality regulation (which nobody disputed it has the power to do) in accordance with the specific

criteria set forth in the above enabling act, *'a fortiori'*, the legislature has the power to authorize the Commission to re-delegate its regulation-making authority.

Therefore, the trial Court erred when it made the following statement:

> "I am of the opinion therefore, that the determination of seasonality was neither delegated nor intended to be delegated. An examination of the law discloses that the determination of seasonality is not only one of the most important functions of the Commission but also one that must be performed before the law can become fully operative. It is inconceivable that the exercise of this function would be delegated." (R. 50.)

In this personal opinion of the trial judge he failed to consider Section 51-5-1 (f), supra, and distinguished between an unlawful delegation of a legislative function to an administrative agency, (Cf. *Schechter v. United States,* 295 U.S. 495; *Panama Ref. Co. v. Ryan,* 293 U.S. 388; 42 *Am. Jur., Public Administrative Law,* Section 49) and a case, such as this, where the Territorial Legislature made an admittedly lawful delegation of power, properly circumscribed by specific standards, to an administrative agency and then, by separate statute authorized the same agency to re-delegate the power to "any person". An examination of its minutes shows that the commission was not as generous as the legislature authorized it to be in the matter of delegating its powers. It only permitted its director to issue rules

and regulations between sessions and subjected the exercise of this power to careful scrutiny at the next meeting.

Twenty-six (26) states provide for a single executive head without a board or commission to administer its employment security laws.[6] Merely because in Alaska the Legislature created a commission to administer the territory's law does not preclude the same legislature from authorizing the commission it created to re-delegate its powers to "any person" including its executive head.

In Re (b): That Regulation No. 10, by only classifying the salmon industry as seasonal, ignored the mandate of law that all employing units must be classified as seasonal or non-seasonal and its failure to do so constitutes discrimination.

II.

There Was No Mandate of Law That the Seasonal Status of All Employing Units in Alaska Be Passed Upon at the Same Time.

The statute quoted below clearly shows that the legislature vested wide latitude and discretion in the Commission concerning seasonality classification. It is difficult to perceive how a reasonable person can read into the statute the requirement that the Com-

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[6]"Comparison of State Unemployment Insurance Laws" as of December, 1955, 115-116, by U. S. Department of Labor, Bureau of Employment Security, 1956.

mission *must* concurrently classify *all* employing units as seasonal or non-seasonal and its failure to do so constitutes unlawful discrimination against employing units which are not so classified:

"(c)(1) Seasonal Employer. As used in this section the term 'seasonal employer' means an employer or operating unit of an employer which because of the seasonal nature of its operations, reduces its employment to such an extent that its monthly payroll for each of three consecutive months in each of two consecutive calendar or operating years immediately preceding the year for which the determination is made, is less than one-half the average monthly payroll for the three consecutive months of highest payroll in the same calendar or operating years. No such employer or operating unit shall be deemed to be seasonal unless and until so determined by the Commission. A successor in interest of a seasonal employer or operating unit shall be deemed seasonal upon the same basis as the predecessor unless determined otherwise by the Commission.

(2) Seasonal Period and Duration of Determination. In establishing a seasonal period as contemplated herein, the Commission shall make such investigations and conduct such hearings as may be required, and shall use as a guide data relating to the best practices of the industry in which the employer is engaged.

When the Commission has finally determined seasonal periods, it shall issue a regulation specifying the seasonal periods during which benefits shall be payable to eligible beneficiaries for unemployment occurring within the benefit year affected by such regulation."

If the Commission was required to concurrently classify all Alaskan employing units it would not make sense for the legislature to require it to make investigations, conduct hearings, etc. If the Trial Court's construction of the statute were valid, all the Commission need do is to apply the Section 7 (c)(1) payroll formula to all employing units then issue the seasonal regulation. Under such a procedure there certainly would be no need to conduct hearings and "use as a guide data relating to the best practices of the industry." It is apparent that the gist of the statute was to vest discretion in the Commission in the matter of seasonally classifying employers. The wisdom of this approach is apparent in the case of temporary plant shutdowns for inventorying, tool changes, etc. Under the trial Court's interpretation these employers, who are not seasonal at all, would meet the payroll formula and be classified.

Even if the statute is read as requiring the Commission to determine the seasonal status of every employing unit in Alaska such a momentous task could not be possibly accomplished during the short time that elapsed between the effective date of Section 7 of Chapter 99 (April 1, 1953) and the date Regulation No. 10 was issued (June 29, 1953). The issuance of this regulation may very well have been the first phase of a program to, in fact, determine the seasonal status of all Alaskan employers. Its issuance certainly did not preclude the Commission from subsequently determining the status of other Alaskan employers. The vice of the District Court's error was

its assumption that the promulgation of Regulation No. 10 was the only action the Commission intended to take concerning the seasonality problem. At the least the Court should have given the agency a year to work on the problem before it entertained a lawsuit on July 30, 1953, a mere four months after the effective date of Section 7 of Chapter 99.

In Re (c): That since under no circumstances could the regulation be upheld, the plaintiff's failure to exhaust its administrative remedy is immaterial since that doctrine is not applicable when a void regulation is involved.

III.

The Plaintiff and Intervenor Failed to Even Attempt to Exhaust an Available Administrative remedy.

The pertinent part of Section 7 (c)(2) of Chapter 99, SLA 1953 which prescribes this remedy reads as follows:

> "Prior to June thirtieth each year, a written determination declaring the employer to be seasonal and specifying the period of seasonal operation shall be forwarded to the employer involved. Notice of the determined season shall be forwarded to any representative of individuals in the employment of such employer and of whom the Commission has knowledge. Within fifteen days after the date of mailing or handing such written declaration, the employer or other interested party may appeal from such determination. An appeal shall be made to the Commission stating

therein why the determination is appealed. After affording the parties a reasonable opportunity to submit briefs with respect to the determination appealed from, the Commission may affirm, modify, or set aside such determination, and such action of the Commission shall be deemed conclusive unless further appeal is initiated as provided in Section 51-5-7 (h) herein."

Section 51-5-7 (h) ACLA 1949 states:

"(h) Appeal to Courts. Any decision of the Commission in the absence of an appeal therefrom as herein provided shall become final thirty days after the date of notification or mailing thereof, and judicial review thereof shall be permitted only after any party claiming to be aggrieved thereby has exhausted his administrative remedies as provided by this Act. The Commission shall be deemed to be a party to any judicial action involving any such decision, and may be represented in any such judicial action by any qualified attorney employed by the Commission and designated by it for that purpose, or at the Commission's request by the Attorney General."

During the trial the plaintiff argued "that there was no Commission to appeal to". (R. 48.) The trial Court disposed of this contention as follows:

"* * * The remaining contentions are in my opinion untenable for, apparently, the new members of the commission had qualified, and in any event an appeal may be prosecuted although the appellate tribunal is not in session." (R. 48.) (See Appendix "L" herein which shows that all members of the Commission were appointed on June 24, 1953.)

But the trial Court went on to hold that the exhaustion of remedies rule was not applicable because: (1) the director has no authority to issue Regulation No. 10, (2) that it was not promulgated in compliance with the law, and (3) it is wrong to require plaintiff to exhaust his remedy by way of administrative appeal "in a case in which it would appear that under no circumstances could the regulation ultimately be upheld." (R. 51.)

All of these reasons are predicated on the erroneous construction of Chapter 99, SLA 1953. See subparagraphs (a)(b), supra.

The plaintiff and intervenor admittedly did not follow the statutory appeal procedure prescribed by the statute. It has been shown that Regulation No. 10 is a valid regulation. It must therefore follow that for their failure to exhaust available administrative remedies plaintiff and intervenor should not be permitted to have recourse to the Courts. Cf. *Regal Knitwear Co. v. National Labor Relations Board,* 324 U.S. 9; *Phelps Dodge Corp. v. National Labor Relations Board,* 313 U.S. 177; *United Fuel Gas Co. v. Railroad Comm.,* 278 U.S. 300, 309-310; *Myers v. Bethlehem Shipbuilding Corp.,* 303 U.S. 41. A pertinent observation relative to exhaustion of administrative remedies was made by this Court in a recent case dealing with Alaska's Employment Security program. In *Unemployment Compensation Commission v. Aragon,* 329 U.S. 143, 155, it was pointed out:

> "* * * The responsibility of applying the statutory provisions to the facts of a particular case

was given in the first instance to the Commission. A reviewing court usurps the agency's function when it * * * deprives the commission of an opportunity to consider the matter, * * *."

In Re (d): That the failure to classify employers in the construction industry as seasonal has caused a depletion of the Unemployment Trust fund by payment of benefits to employees of that industry which in turn require greater contributions by, and the loss of credit ratings to, the plaintiff as an employer and decreased benefits to the intervenor, as an employee.

IV.

There Has Been No Showing of Irreparable Damages or Any Threat Thereof.

On page 18 of its brief in District Court, appellee makes this statement:

"* * * If plaintiff is obliged to pay into this fund any amount of money which, under some regulation such as the one in question, may not be credited to plaintiff for the purpose for which it was paid in, plaintiff has been irreparably injured * * *."

In the District Court the plaintiff argued that as a result of the rapid depletion of the fund, "* * * the contributors are bound to suffer injury and the employees are bound to suffer irreparable injury * * *" (Page 15 of appellee's brief in trial Court.) The District Court held that the claim of alleged irreparable

damage "* * * is based, in the main, on the progressive elimination of the fund * * *" (R. 52.)

The District Court made the following findings of fact concerning the manner in which the appellee allegedly has been irreparably injured (R. 60):

> "12. That the plaintiff has been irreparably injured and will be further irreparably injured by the application of pretended amended regulation No. 10 to it and others on whose behalf this action is brought, for the reason (1) that the pretended amended Regulation No. 10 does not set up the proper seasons or periods during which they carry on their fishing and canning operations in the Territory and (2) it does not properly define the seasons, which would result actually in making some employees of the plaintiff and others seasonal, and other employees nonseasonal, although all are engaged in the same employment." (Captioned numbers added.)

Both of these grounds are fallacious. The record discloses that the canned salmon industry requested that a seasonality regulation be issued based upon the open fishing season prescribed by the Federal Fish and Wildlife Service. (R. 217-218.) Appellee is now most certainly estopped to deny any alleged irreparable injury resulting from the promulgation of the very type of regulation it requested to be issued. Furthermore, it can hardly be disputed that the Commission is in the better position to "set up the proper seasons or periods during which they carry on their fishing * * *". This points to an additional reason why appellee should have been denied judicial review

until after the regulatory Commission has had an opportunity to consider these type objections. It may very well have been that the Commission would have changed the regulation to appellee's liking had it been given a chance to do so.

In findings of fact No. 18 (R. 63), the District Court found that the appellee has already been injured and will be further injured if the fund is depleted, for, in such an event, much greater employer contributions will be required to continue payments.

First, the most obvious fallacy in this finding is the fact that the regulation which is the subject matter of this suit actually is designed and does preserve the solvency of the fund; and second, there is no evidence showing in what manner the appellee is irreparably injured. In no event shall the contributions be increased by anyone save the legislature, and when and if such contributions are raised or lowered, there are numerous complex factors, of which seasonality constitutes only one narrow element, that enter into a final decision. Appellee has not shown that it has paid one extra cent in contributions between the time of this suit and the present, resulting from the promulgation of seasonality regulation No. 10.

As indicated in the above quote from page 18 of appellee's brief in District Court, the argument was presented for the first time after trial that the enforcement of Regulation No. 10 caused monies appellee paid into the fund "not be credited to plaintiff for the purpose for which it (the monies) was paid in." This argument is not in accord with reality or the proof

submitted by Fidalgo Packing Company in the course of the trial. Regulation No. 10 most certainly does not cause monies to be credited for purposes other than those for which it was paid in. The enforcement of the regulation caused monies to be retained in the fund that would otherwise be paid out.

As to the intervenor's status, counsel was forced to admit that due to the fact that she is a nonseasonal employee "she will no longer be injured by the fact that the seasonal regulation as applied to her, is unrealistic." (Quoted on page 23 of appellee's brief in District Court.)

These conflicting contentions clearly exemplify the paradoxical position appellee has taken throughout the litigation in its attempt to portray itself as a representative of seasonal employees in the salmon industry. There is simply no casual relationship between the enforcement of the regulation, the depleted fund, and alleged irreparable damages the appellee and intervenor are supposedly suffering.

Finally, this Court has ruled that an injunction should not issue against a public agency unless the need for the same is clear and not remote or speculative. *Eccles v. Peoples Bank,* 333 U. S. 426, 431.

3. **BY PREDICATING ITS DECISION, IN PART, UPON LEGISLATIVE DEVELOPMENTS OCCURRING SUBSEQUENT TO TRIAL WHICH HAVE NO CONCEIVABLE BEARING ON THE ISSUES IN THIS CAUSE AND WHICH NEITHER COUNSEL PRESENTED TO THE COURT IN ANY MANNER, THE COURT BELOW HAS SO DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.**

In its original per curiam opinion the Court of Appeals made this seemingly anomalous observation:

> "We indicate no doubt of the validity of the result by recognizing that there are other legislative developments in this field since the cause was tried." (Appendix "B".)

And again in its per curiam opinion, denying our petition for rehearing, the Court made this rather startling statement:

> "On the other hand, an emergency has obviously been prevented by federal legislation."

These statements by the Court of Appeals are indeed perplexing. We are not at all sure what "other legislative developments" validates its decision. The underlying issue then before the Court and which will be presented to this Court if certiorari is granted is whether or not amended Regulation No. 10 is a valid Regulation. After final determination of this issue, appropriate disposition will be made of $650,000.00 in impounded unemployment trust funds.

No subsequent legislation either Territorial or Federal has in any manner whatever effected the determination of that or any other issue involved in this litigation.

However, there have been three legislative enactments, two Territorial and one Federal, relative to Alaska's Employment Security program.

(First) Congress enacted a statute[7] which authorized Alaska's Employment Security Commission, notwithstanding restrictions against borrowing in the Territory's Organic Act, to apply for a loan from the Federal Government in order to replenish the Territory's depleted unemployment compensation fund.[8] Application was in fact made by the Territorial Governor to the Federal Government for a loan, and on

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[7]Public Law 56, 84th Congress approved by the President June 1, 1956.

[8]42 U.S.C.A. 1321 authorizes the Secretary of Labor to make advancements to state unemployment funds which are in a depleted condition. Section 3302(c)(2) (26 U.S.C.A. 3302), in effect increases the payroll taxes paid by the employers in the borrowing state to be applied in re-payment of the loan in the event the state unemployment fund has an insufficient balance to re-pay the same. The technical explanation of the manner in which re-payment is assured the Federal Government is set forth in page 1 of the 1955 Annual Report of Alaska's Employment Security Commission as follows:

> "If repayment of the entire amount received by Alaska from the Federal unemployment account is not completed by December 1 of the fourth full calendar year following the date on which the earliest advance remaining unpaid was made, automatic repayment sets in. This is accomplished by a reduction in the offset which Alaska's employers who are subject to the Federal Unemployment Tax Act (on and after January 1, 1956, employers of four or more for twenty weeks during the year (instead of eight or more) will be liable for the Federal Tax) may claim against their Federal tax liability. Beginning with the tax due for that fourth full calendar year, the offset allowable is reduced by 5 percent of the 3.0 percent tax liability, so that the maximum offset is reduced from 2.7 to 2.55 percent of covered payrolls. If any indebtedness continues into the next taxable year, the offset is further reduced from 2.55 to 2.4 of covered payrolls and so on, year after year, until the advance is paid off."

July 1, 1955, the Territory received a $3,000,000.00 loan from the Federal Government.[9]

(Second) Chapter 8, Extraordinary Session Laws of Alaska, 1955, was enacted by the Territorial Legislature. This statute authorized the issuance of a $2,000,000.00 loan from the Territorial General Fund to the unemployment compensation fund. $1,800,000.00 was borrowed under authority of this statute in order to avoid a complete breakdown of Alaska's Employment Security program.[10]

On June 7, 1955, pursuant to express authority to do so in Public Law 56, 84th Congress, the Commission repaid to the Territorial General Fund, from the $3,000,000.00 loan it received from the Federal Government, the $1,800,000.00 it had previously borrowed from the Territory.[11]

(Third) Chapter 5, Extraordinary Session Laws of Alaska 1955 was enacted by the Territorial Legislature. This statute is a complete recompilation with appropriate additions and deletions, of all Territorial laws pertaining to employment security. No provision therein has any relevancy whatever to the issues in this litigation.

If it is the contention of the Court of Appeals that the above legislation obviated an emergency, its assumption is only partially true and subject to qualifi-

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[9]Annual Report of Alaska's Employment Security Commission, Fiscal Year ending June 30, 1955, page 1.

[10]Annual Report of the Alaska Employment Security Commission, supra.

[11]Annual Report, supra, page 1.

cation. A temporary emergency was alleviated in that the Federal loan permitted the payment of benefits that would otherwise have been stopped. However, a pressing emergency still exists and is in many respects more serious than it was in any previous time. It is a matter of public knowledge that the balance in the Alaska Unemployment trust fund as of April 30, 1956 is $1,254,290.37. Included in this amount is the $650,000 impounded by order of the District Court to be disbursed in the event the validity of amended Regulation No. 10 is not ultimately upheld. Also, the fund is indebted to the Federal Government for $3,000,000.00. It is readily apparent that the condition of Alaska's trust fund is in a state of extreme emergency and if the $650,000.00 involved in this litigation is paid out a further crisis may result.

In view of these considerations, it is inconceivable how the Court below can state that its decision has been validated and that an emergency has been obviated by subsequent legislation.

It is especially distressing to have the Court not even bother to pass upon, discuss or otherwise dispose of our arguments and contentions advanced to them by brief and oral argument. We believe that if the Court had seriously considered these contentions, it would have reversed the District Court and declared Regulation No. 10 to be valid. Instead, the Court of Appeals in two separate per curiam opinions, without citing a single judicial authority in support of its conclusion, or even mentioning our main contentions, adversely decided an issue of vital and far-reaching im-

portance to the people of the Territory of Alaska on what we feel to be an unduly technical and manifestly erroneous ground.

CONCLUSION.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated, Juneau, Alaska,
September 14, 1956.

Respectfully submitted,

J. GERALD WILLIAMS,
Attorney General of Alaska,

By EDWARD A. MERDES,
Assistant Attorney General,

Attorneys for the Alaska Employment Security Commission.

(Appendices Follow.)

Appendix "A"

FULL TEXT OF DISTRICT COURT'S OPINION.

IN THE U. S. DISTRICT COURT FOR THE DISTRICT OF ALASKA
DIVISION NUMBER ONE, AT JUNEAU

FIDALGO ISLAND PACKING COMPANY, a corporation, *Plaintiff,* vs. A. B. PHILLIPS, Executive Director, Employment Security Commission of Alaska, *Defendant,* CLARA WILSON, *Intervenor.*	May 7, 1954 No. 6865-A

OPINION

H. L. FAULKNER, of FAULKNER, BANFIELD & BOOCHEVER, Juneau, Alaska, for plaintiff.

EDWARD A. MERDES, Assistant Attorney General of Alaska, Juneau, Alaska, for defendant.

Plaintiff, a salmon packer, and intervenor, a cannery employee, seek to enjoin the enforcement of Regulation 10, promulgated June 29, 1953, by the then Acting Director of the Employment Security Commission, establishing seasonal periods for employers in the canned salmon industry, on the ground that it is invalid and that its enforcement will injuriously affect them, and in support thereof contend:

(1) That the defendant had no authority to make Regulation 10 because (a) the authority previously delegated to him expired with the abolition of the Unemployment Security Commission on June 26, 1953, by Chapter 82, S.L.A. 1953; (b) the regulation does not conform to the formula prescribed by Section 7 of Chapter 99, S.L.A. 1949, for the determination of seasonal and nonseasonal employment; and (c) that prior to its issuance no notice was given to, nor any opportunity to be heard afforded, those affected by the regulation;

(2) That it selects salmon packers only and excludes others engaged in seasonal activities, particularly those engaged in construction, and, hence, is discriminatory in its operation as between such employers and as between their nonresident and resident workers.

The defendant contends:

(1) That neither the plaintiff nor the intervenor may challenge the validity of the regulation because (a) they failed to exhaust the administrative remedy of appeal provided by Chapter 99, S.L.A. 1953; and (b) that the plaintiff and intervenor have failed to show any irreparable injury.

In opposition to the plaintiff's first contention the defendant argues that the authority of the defendant to promulgate the regulation was not affected by the repeal of the prior law creating the Commission because (a) the new Commission was in existence; and (b) the statute repealed was simultaneously re-enacted.

The canned salmon and the construction industries are fairly comparable. Both depend to a great extent on nonresident workers who come into the Territory in the spring and leave in the late summer or early fall. In both employment is at its peak in July and at its lowest in January and February. To illustrate, in 1953, which is typical of recent years, as against 13,680 employed in the canned salmon industry in July and 624 in midwinter the construction industry employed 15,709 and 3,818. The Commission has declared only the salmon industry to be seasonal. Although proportionate contributions are made by both industries to the unemployment fund, the employees of the canned salmon industry are paid benefits only if they are unemployed during the seasonal periods fixed by the Commission, whereas the employees of the construction industry receive benefits over the entire year, which in many, if not most cases, amount to far more than their contributions. In 1953 these amounted to $1,828,017.00 for nonresident workers. It is not surprising, therefore, to learn that despite the fact that employment has been at an all-time high in recent years, due to defense construction, the fund has nevertheless dwindled steadily. In 1953 contributions and benefit payments totaled $4,101,000.00 and $5,640,-783.00 respectively. At the same time the ratio of reserves to taxable pay rolls, which must be maintained at a certain level before experience rating credits may be allowed employers, had decreased from 21.82% in 1946 to 5.62% in 1953. On March 31, 1954, and April 24, 1954, the fund amounted to $5,327,213.57 and $4,380,-

000.00 respectively, and in 1953 the Commission paid out in benefits approximately 40% more than it received in contributions.

An employee who earns at least 80% of his wages during the year in seasonal employment is classified as a seasonal worker and is eligible to receive unemployment benefits only if unemployed during the seasonal period fixed for his employer by the Commission, whereas, if he is classed as a nonseasonal worker, he may receive benefits for 26 weeks.

Upon the final hearing the Court declared that it would take judicial notice of the fact that outside construction work in the Territory, except in Ketchikan and vicinity, is limited by weather to the period from May to October, and is therefore, seasonal in fact.

The present Director of the Employment Security Commission has been substituted for his predecessor as defendant.

Section 51-5-1 (f), A.C.L.A. 1949, defines the Commission as including any person to whom the Commission delegates its power and duties. Section 51-5-11 (d) provides that the Commission may "appoint and prescribe the duties of such officers, accountants, attorneys, experts, and other persons as may be necessary in the performance of its duties," and "may delegate to any such person so appointed such power and authority as it deems reasonable and proper for the effective administration of this act * * ". Pursuant thereto the Commission in 1938 delegated authority to the Director to "make rules and regulations when the Commission is not in session."

Section 51-5-10, A.C.L.A. 1949, was repealed by Chapter 82, S.L.A. 1953, effective June 26, 1953. The effect of this was the abolition of the Commission. Chapter 83, S.L.A. 1953, effective June 26, however, substantially re-enacted the provisions repealed. Since the terms of the several members of the Commission were originally fixed by statute to expire at different times, implying an intention to give it continuity, it is clear that in enacting Chapter 83 it was the intention of the Legislature to start anew with a new Commission. Under the new law the members were appointed on June 24, 1953, but it does not appear when they were confirmed or when they qualified.

Chapter 99, S.L.A. 1953, made extensive changes in the law by the way of repeal and amendment. Section 7 thereof, prescribing a new formula for determining seasonality of employment and requiring the Commission to make such determination before June 30, became effective April 1, 1953, but the remainder of the Act did not become effective until July 5, 1953. It was under Section 7 of this Act that the defendant on June 29 promulgated Regulation 10.

This suit was commenced July 29, 1953.

Obviously, the Commission could not function until the new members qualified, met and organized. The first meeting of the Commission was on August 6, 1953, but it appears that it adjourned without taking any action with respect to the attack on Regulation 10. Indeed, it appears that there was a disposition on the part of the Commission to shirk its responsibility in the face of group pressure. On one side were arrayed

those engaged in construction activities, the unions and their members, who find it to their advantage to resist classification as seasonal notwithstanding that the character of the industry is clearly seasonal; and on the other those engaged in salmon packing, their unions and members, as well as others engaged in non-seasonal activities, who assert that the failure to classify the construction industry as seasonal results in discrimination against them, deprives them of equal benefits under the law, and imposes greater burdens on them.

On behalf of the plaintiff and intervenor it is argued that, unless Regulation 10 is declared invalid and industries are classified according to their character instead of according to group pressure, the unemployment compensation fund will soon be depleted to the point where under the mandatory provisions of Section 51-5-2 (b) (1), A.C.L.A. 1949, contributions will have to be increased and benefits drastically decreased.

The questions presented are:

(1) Should the rule of the exhaustion of administrative remedies be applied to this case?

(2) Is Regulation 10 valid?

(3) Is the injury threatened irreparable?

The general rule of course is that one must exhaust his administrative remedies before he may resort to the Courts. I am convinced that, if this rule is applicable to the facts of this case, the plaintiff cannot prevail.

Chapter 99, S. L. A. 1953, requires a redetermination by the Commission of seasonal periods of employ-

ment according to the formula prescribed by Section 7 thereof, the issuance of a regulation specifying such seasonal periods, the giving of notice thereof to the employer affected, and allows anyone aggrieved to take an appeal to the Commission within 15 days. Neither the plaintiff nor intervenor appealed from Regulation 10. The defendant contends that their failure to exhaust this remedy bars their resort to this Court. On the other hand, the plaintiff and intervenor contend that the authority delegated to the defendant expired with the abolition of the Commission by Chapter 82, that there was no Commission to appeal to until August 6th, when it met for the first time, and that in any event an appeal would have been futile because, when the new Commission finally met in October, it became deadlocked by reason of a tie vote on every major issue and, hence, was unable to function.

The last contention may be disposed of by the observation that the application of the doctrine does not depend on what may be said in retrospect. Here, as in analogous situations, diligence is the criterion. The remaining contentions are in my opinion untenable for, apparently, the new members of the Commission had qualified, and in any event an appeal may be prosecuted although the appellate tribunal is not in session.

But although these contentions would ordinarily be without merit, they may yet be considered in determining whether the circumstances of this case are such as to warrant the conclusion that the doctrine should not be applied.

I turn now to a consideration of this question.

The authority delegated to the Director of the Commission was to "make rules and regulations when the Commission is not in session." This clearly contemplates matters arising between sessions of the Commission such as has not arisen by, or were not foreseen at, the time of adjournment. Obviously, it cannot be said that the determination of seasonal periods, to say nothing of the redetermination thereof, by the new Commission according to the formula prescribed by Section 7 of Chapter 99, after the intentional abolition of the old Commission, was a matter arising between sessions. On the contrary, it was the first task of the new commission.

The law expressly requires the Commission to determine seasonality and provides, Section 7 (c) (1), that "no such employer or operating unit shall be deemed to be seasonal unless and until so determined by the Commission," and, further, that "when the Commission has finally determined seasonal periods, it shall issue a regulation specifying the seasonal periods during which benefits shall be payable to eligible beneficiaries for unemployment occurring in the benefit year affected by such regulation."

Generally speaking, the limit of the authority of and administrative officer is the carrying out of a law according to its terms. Here, under the authority delegated, the defendant assumed the exercise of what appears to be a discretionary power. The defendant makes the point that the regulation does not determine the seasonal periods but merely specifies them. Not only is this distinction immaterial, but the argument

overlooks the fact that it is the regulation which gives effect to the determination of seasonal periods and is the means by which such determination is enforced. I am of the opinion, therefore, that the determination of seasonality was neither delegated nor intended to be delegated. An examination of the law discloses that the determination of seasonality is not only one of the most important functions of the Commission but also one that must be performed before the law can become fully operative. It is inconceivable that the exercise of this function would be delegated.

Another factor to be taken into consideration, in determining whether the doctrine of the exhaustion of administrative remedies should be applied to this case, is the validity of the regulation. It not only appears that the regulation ignores the mandate of the law that all employers and employing units be classified as seasonal and nonseasonal and the seasonal periods for each established, but also that the regulation classifies the canned salmon industry not by employers or units thereof, but by areas and open seasons as established by the Fish & Wildlife Service, regardless of the disparities between such seasons and the periods of actual operations. The effect of this is to require greater contributions by the employer from which neither the employer nor employee derives any benefit. It also appears that the regulation was adopted without notice and without affording those concerned an opportunity to be heard, as prescribed by Section 51-1-11(b).

From what has already been said it is clear that the regulation is not within the authority delegated,

that it was not promulgated in compliance with statutory provisions, and that it is inconsistent with the law under which it was purportedly made because it selects one seasonal industry and fixes the seasonal periods therefor, whereas the law requires the determination of seasonal periods for all employers, and, hence, is discriminatory in its application and operation.

While the fact that the Commission has been unable to function since its organization, because of the deadlock referred to, would ordinarily be irrelevant on the question of whether administrative remedies have been exhausted, it is nevertheless a circumstance that may be taken into consideration in determining whether the rule ought to be applied. The plaintiff was more likely mistaken than remiss in not availing itself of an appeal, but there is no question of its good faith. Moreover, even had the time not expired, it would seem wrong to require the plaintiff to exhaust his remedy by way of an appeal in a case in which it would appear that under no circumstances could the regulation ultimately be upheld. Indeed, the very nature of the problems presented poses the question whether the remedy is not judicial, rather than administrative, to which the doctrine of the exhaustion of remedies would not apply. In view of the circumstances of this case, I am of the opinion that the doctrine should not be applied. 39 *Cornell Law* Quarterly 285; *Gonzales vs. Williams,* 192 U. S. 1; U. S. *ex rel. DeLucia vs. O'Donovan,* 178 F. 2d 876; *Public Utilities Commission vs. Gas Company,* 317 U. S. 456; *Breiner vs. Vallin,* 79 F. Supp. 506, 507-8.

The final question is whether the plaintiff or intervenor has shown threatened injury of an irreparable character.

Although it can hardly be said that Regulation 10 is discriminatory on its face, it is clear that, being limited to only one of the many seasonal industries, its operation and enforcement result in discrimination against all employers in the canned salmon industry and their employees. The law clearly requires the classification of employers as seasonal or nonseasonal, and it is not perceived how the law could operate fairly or uniformly until this is done.

The claim of irreparable injury is based, in the main, on the progressive diminution of the fund, which in turn will require greater contributions by, and the loss of credit ratings to, the employer, and decreased benefits to the employee.

The failure to classify the construction industry as seasonal is undoubtedly the largest contributing factor in the process of depletion. In the case of year-round employment, although the employers contribute for the entire year, their employees receive no benefits. The construction industry contributes only for six months of the year or so but its employees may draw the maximum compensation. For example, the maximum contribution, on the first $3000.00 of the wages of an employee of the former who receives no benefits, is $81.00, but an employee of the latter, contributing about half as much, may receive up to $910.00 in benefits.

A worker in the canned salmon industry is eligible for unemployment relief only if he is not employed during the seasonal period fixed by the Commission, whereas employees in other industries which are in fact seasonal but have not been so classified may receive benefits over the entire year if unemployed. As between resident and nonresident workers in the canned salmon industry, the resident may receive benefits only if unemployed during the period referred to, whereas the nonresident is not so limited. Since all this results in the payment of increased benefits to the favored classes, it accelerates the depletion of the fund, which in turn will require a drastic increase in the rate of employer contributions and a corresponding decrease in benefits to employees. It appears, therefore, that although the plaintiff is required to contribute proportionately to the unemployment compensation fund, the fund is disbursed largely for the benefit of those who become entitled to disproportionate benefits solely by reason of being treated as nonseasonal when in fact their employment is seasonal, and that the payment of such benefits is causing the depletion of the funds, to the prejudice of the plaintiff and intervenor.

The defendant argues that, if the regulation is invalidated, the unemployment compensation fund will be more quickly exhausted because of the necessity of paying benefits to cannery workers on a par with nonseasonal workers. It requires no perspicacity to see that if one entitled to a share of a common fund foregoes his right thereto the process of depletion will be retarded. Aside from the fact that such an argument

can have no appeal to a court of equity, it is wholly irrelevant. The paramount objective of the court is justice. The depletion of the fund is of no concern to the court except as it may shed light upon the contentions of the parties. It may not be amiss, however, to point out that, apparently, the defendant is concerned with depletion only if the process is accelerated by according the same rights to the plaintiff and the intervenor as all others engaged in seasonal activities receive.

This suffices to show that the threatened injury is irreparable in character. I conclude, therefore, that the plaintiff and intervenor are entitled to have the enforcement of Regulation 10 enjoined.

/s/ George W. Folta
District Judge

Appendix "B"

FULL TEXT OF COURT OF APPEALS' ORIGINAL OPINION.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

A. B. PHILLIPS, Executive Director Employment Security Commission of Alaska,

Appellant,

vs.

FIDALGO ISLAND PACKING CO.,

Appellee.

CLARA WILSON,

Intervenor.

No. 14,505
Sep. 13, 1955

Appeal from the District Court for District of Alaska, Division Number One.

Before: HEALY, FEE and CHAMBERS, Circuit Judges. PER CURIAM

This is an extremely confusing case in which appeal is taken from the judgment of the District Court of the District of Alaska, holding an administrative order null and void for lack of jurisdiction on the part of the Territorial employee who purported to promulgate it. The court issued an injunction against enforcement.

Fidalgo Island Packing Co., an employer of labor in the fishing industry of Alaska, and the Intervenor, one

Clara Wilson, who claimed to be an employee in that industry, obtained a permanent injunction against the enforcement of the purported Amended Regulation No. 10. This regulation attempted to specify seasonable periods during which benefits would be payable to eligible beneficiaries for unemployment occurring within the benefit year, out of the Employment Security Fund established by the Territorial Legislature. This Amended Regulation was supposedly issued by and under the authority of the Employers Security Commission which was no longer in existence at the date of the issuance thereof.

The trial court found that the Packing Company and the Intervenor were entitled to represent the employers and employees in the industry and that the Packing Company and all others on whose behalf the action was brought had been injured and would be further irreparably injured if the purported regulation were enforced.

The trial court made, among others, the following findings of fact:

> "1. That the Employment Security Commission of Alaska, formerly known as the Unemployment Compensation Commission, was created by Act of the Legislature of Alaska at the extraordinary session in 1937 and under the provisions of Section 51-5-10 of what is now the Alaska Compiled Laws Annotated, 1949, and that on March 26, 1953, at its session of that year, the Alaska Legislature passed Chapter 82, Session Laws of Alaska, 1953, abolishing the Employment Security Commission, and this Act became effective on June 25, 1953. On the same day the Legislature enacted Chapter 83, Ses-

sion Laws of Alaska, 1953, creating a new and different Commission, which Act became effective on June 25, 1953.

"2. That no meetings of either the old or the new Commission were held under any statute of the Territory after March, 1953, and until August 6, 1953, and, the old Commission having ceased to function and having only one member from March 26, 1953, until and including June 25, 1953, John T. McLaughlin during that period and until sometime after August 6, 1953, assumed to act as Acting Director of the Employment Security Commission of Alaska, and he was succeeded by A. B. Phillips, the present Director of Employment Security Commission of Alaska, on August 24, 1953. The former defendant in this case, John T. McLaughlin, on June 29, 1953, assumed to promulgate and to distribute to all persons and corporations engaged in packing salmon in Alaska, purported amended Regulation No. 10, which is set up in Paragraph 6 of plaintiff's complaint.

"3. That this purported amended Regulation set certain seasons of seasonal employment for all persons and corporations engaged in packing of salmon in the Territory of Alaska, and notices were sent to plaintiff and to all others similarly situated and to all those engaged in packing salmon in Alaska that this purported and attempted Regulation was in effect from and after July 5, 1953, superseding all former regulations on the subject.

"4. That on March 23, 1953, the Legislature of the Territory passed an act known as Chapter 99, Session Laws of Alaska 1953, amending the Unemployment Compensation Act of Alaska, which, with exception of Section 7 thereof, became effective on

July 5, 1953, and Section 7 thereof became effective on April 1, 1953.

"5. That the provisions of Chapter 99, Session Laws of Alaska 1953, provide that the Employment Security Commission is charged with the duty of classifying all employers in Alaska as seasonal or nonseasonal in accordance with their employment records for the previous two consecutive calendar years or operating years. This duty is enjoined upon the Commission and under the provisions of Chapter 99, Session Laws of Alaska 1953, employment for the purpose of determining seasonality is placed upon an employer or unit basis rather than on an industry basis, as under the old law which was repealed by Chapter 99.

"6. That neither the former Acting Director McLaughlin nor the Employment Security Commission of Alaska had, prior to June 29, 1953, or at any other time, made any classifications of seasonality in employment in the Territory, except those attempted to be made by purported amended Regulation No. 10, which attempted to apply seasonality to the salmon canning industry as an industry. No other industries or employers have been classified as seasonal.

* * * * * * * *

"9. That the former defendant, John T. McLaughlin, and the present defendant, A. B. Phillips, are threatening to enforce purported amended Regulation No. 10 unless enjoined by the court.

"10. That at the time purported amended Regulation No. 10 was attempted to be promulgated and declared to be in force, the former Employment Security Commission had been abolished and the new Commission had not yet come into existence and

had not met at the time this action was instituted, and they did not meet until August 6, 1953, and there was no Commission in existence to which an appeal could have been taken from purported amended Regulation No. 10.

"11. That former Acting Director McLaughlin had no power or authority on June 29, 1953, to promulgate any regulation affecting seasonal employment in the Territory, or any other regulation of the Commission, and such authority as might have been delegated to him at one time under the old Commission did not exist on June 29, 1953, and could not be exercised on or after that date. The purported amended Regulation No. 10 is, therefore, void and no appeal to the Commission is necessary and no pursuit of any administrative remedies was necessary to attack the validity of pretended amended Regulation No. 10 and no appeal to any administrative body is required from an invalid order made by one without authority."

Upon these findings the court concluded that the purported amended Regulation was void and of no effect.

There is a presumption of lawful exercise of authority surrounding the acts of courts of general jurisdiction which is not enjoyed by administrative bodies. Jurisdiction of the subject matter and the persons must be pleaded and proved. No such showing was made here. The facts found by the trial court establish the position that no such showing was possible. Since the order was then void there was no necessity for exhaustion of supposed administrative remedies. All persons could with impunity disregard the order. Any person having a legal interest and suffered injury by threatened en-

forcement would be entitled to have judicial restraint placed upon those presuming to act upon it.

A regulation cannot be issued by a Commission which is no longer in existence. Any delegation of authority by the old Commission became null and void when the body itself was abolished.

We indicate no doubt of the validity of the result by recognizing that there are other legislative developments in this field since the cause was tried.

Affirmed.

(Endorsed:) Per Curiam Opinion. Filed Sep. 13, 1955.

1955. Paul P. O'Brien, Clerk.

Appendix "C"

FULL TEXT OF COURT OF APPEALS' OPINION DISPOSING OF PETITION FOR REHEARING.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

A. B. PHILLIPS, Executive Director, Employment Security Commission of Alaska, *Appellant,* vs. FIDALGO ISLAND PACKING CO., *Appellee,* CLARA WILSON, *Intervenor.*	No. 14,505 June 21, 1956

Upon Petition for Rehearing

Before: HEALY, FEE and CHAMBERS, Circuit Judges

PER CURIAM:

In the petition for rehearing, appellant misreads the per curiam opinion of this Court. There was no intention in that opinion to controvert well established principles. Where an administrative agency or officer has been given jurisdiction over the subject matter of a field, the presumption of validity of the regulations and acts of such agency or officer applies. Here the jurisdiction of the old commission over the subject matter had expired by abolition of the agency. The delegated power

to the Executive Director of the old commission expired when it went out of existence. The rulings may be explained upon principles of agency as well as upon grounds of lack of jurisdiction. If the new commission desired to delegate power to the Executive Director, it could not act before its creation and assumption of authority. His purported action in the interim between the expiration of his delegation of power by the old commission and the organization of the new commission was void, not voidable, because no body had jurisdiction of the subject matter at the time and he had no delegated authority to act in the premises. The fact that the acts abolishing one body and creating another were passed simultaneously is without significance. The only confusion apparent in this case is that of legislative policy and the application thereof by the administrative agencies which have been created. On the other hand, an emergency has obviously been prevented by federal legislation.

The petition for rehearing is denied.

(Endorsed:) Per Curiam Opinion on Petition for Rehearing. Filed June 21, 1956. Paul P. O'Brien, Clerk.

Appendix "D"

SECTION 51-5-1 (f), ALASKA COMPILED LAWS ANNOTATED, 1949.

"(f) 'Commission' means the Unemployment Compensation Commission established by this Act or any person to whom this Commission may delegate its powers and duties."

Appendix "E"

SECTION 51-5-7 (h), ALASKA COMPILED LAWS ANNOTATED, 1949.

"(h) *Appeal to Courts.* Any decision of the Commission in the absence of an appeal therefrom as herein provided shall become final thirty days after the date of notification or mailing thereof, and judicial review thereof shall be permitted only after any party claiming to be aggrieved thereby has exhausted his administrative remedies as provided by this Act. The Commission shall be deemed to be a party to any judicial action involving any such decision, and may be represented in any such judicial action by any qualified attorney employed by the Commission and designated by it for that purpose, or at the Commission's request by the Attorney General."

Appendix "F"

SECTION 51-5-11 (b), ALASKA COMPILED LAWS ANNOTATED, 1949.

"* * * Regulations may be adopted, amended, or rescinded by the Commission and shall become effective in the manner and at the time prescribed by the Commission."

Appendix "G"

CHAPTER 82, SESSION LAWS OF ALASKA, 1953.

TERRITORY OF ALASKA
OFFICE OF THE AUDITOR
JUNEAU, ALASKA

CHAPTER 82
AN ACT

[H. B. 128]

To repeal Subsection (a), paragraphs (1), (2) and (3), and Subsections (b) and (c) of Section 51-5-10, Alaska Compiled Laws Annotated 1949, as amended by Chapter 53, Session Laws of Alaska, 1949.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. That Subsection (a), paragraphs (1), (2) and (3), and Subsections (b) and (c) of Section 51-5-10, Alaska Compiled Laws Annotated 1949, as amended by Chapter 53, Session Laws of Alaska, 1949, be and it is hereby repealed.

Appendix "H"

CHAPTER 83, SESSION LAWS OF ALASKA, 1953.

TERRITORY OF ALASKA
OFFICE OF THE AUDITOR
JUNEAU, ALASKA

CHAPTER 83
AN ACT

[H. B. 129]

To create an Employment Security Commission of Alaska.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. There is hereby created a commission to be known as the Employment Security Commission of Alaska. The Commission shall consist of four members, who shall be appointed by the Governor, by and with the consent of the legislature, in joint session of both houses, as soon as possible after passage and approval of this Act. Members of the Commission shall be residents of the Territory of Alaska and citizens of the United States, over the age of twenty-one years. Not more than two members of the Commission shall be of the same Political Party. Two members shall be representative of industry or management and two shall be representative of labor. Each member shall hold office for a term of six years, except that:

(1) Any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed, shall be appointed for the remainder of that term; and if a vacancy occurs at a time when the legislature is not in session, through death, resignation, removal or disqualification, under this Act, a new member shall be appointed by the Governor to fill the vacancy who shall have the qualifications herein prescribed and who shall hold office for the remainder of the term for which his predecessor was appointed; and

(2) The terms of office of the members first taking office after the date of the enactment of this Act shall begin on the date of their appointment and shall expire, one on February 1, 1955, one on February 1, 1957, one on February 1, 1959 and one on February 1, 1961. The members of the Commission shall be Territorial officers, and before entering upon the discharge of their duties, shall take such oaths of office as are prescribed for Territorial officers. The Governor may, at any time, after notice and hearing, remove any Commissioner for gross inefficiency, neglect of duty, malfeasance in office, or commission of a crime.

Upon the expiration of the term of a member, the Governor shall submit the name of a successor for confirmation by the legislature then in session; if the Governor does not submit such name, the incumbent shall continue to hold office and to perform the duties thereof until his successor shall be appointed and confirmed by the legislature, as in this section provided, and no re-

cess or interim appointments shall be made in such cases.

(3) The Commission shall appoint a director who shall be the chief executive of the Commission, whose compensation shall be Eight Thousand Five Hundred Dollars ($8,500.00 per annum, payable in equal monthly installments; he shall be appointed for a term of four years and may be removed at the pleasure of the Commission. No person shall be appointed Director unless he is a citizen of the United States, a resident of this Territory and has been such resident at least five years immediately preceding his appointment. The Director shall be subject to the supervision and direction of the Commission and shall perform such duties as the Commission may assign him.

(b) One of the members of the Commission so appointed shall be chosen by all members as Chairman of the Commission. Members of the Commission shall be reimbursed for actual travel expenses and shall receive a per diem allowance for each day that they are away from home in connection with their official duties in carrying out the purpose of this Act. The reimbursement of all Commissioners shall be from the Employment Security Commission administration fund.

(c) Any three Commissioners shall constitute a quorum, and no vacancy shall impair the rights of the remaining Commissioners to exercise all the powers of the Commission.

Appendix "I"

SECTION 7 OF CHAPTER 99, SESSION LAWS OF ALASKA, 1953.

"Section 7. That Sec. 51-5-2(c) ACLA 1949 is hereby repealed and a new section in lieu thereof is hereby enacted to read as follows:

(c) (1) Seasonal Employer. As used in this section the term 'seasonal employer' means an employer or operating unit of an employer which because of the seasonal nature of its operations, reduces its employment to such an extent that its monthly payroll for each of three consecutive months in each of two consecutive calendar or operating years immediately preceding the year for which the determination is made, is less than one-half the average monthly payroll for the three consecutive months of highest payroll in the same calendar or operating years. No such employer or operating unit shall be deemed to be seasonal unless and until so determined by the Commission. A successor in interest of a seasonal employer or operating unit shall be deemed seasonal upon the same basis as the predecessor unless determined otherwise by the Commission.

(2) Seasonal Period and Duration of Determination. In establishing a seasonal period as contemplated herein, the Commission shall make such investigations and conduct such hearings as may be required, and shall use as a guide data relating to the best practices of the industry in which the employer is engaged.

When the Commission has finally determined seasonal periods, it shall issue a regulation specifying the seasonal periods during which benefits shall be payable to eligible beneficiaries for unemployment occurring within the benefit year affected by such regulation.

Employers affected by such regulation shall report on forms provided by the Commission the wages payable to individuals in their employ during the inclusive dates of the seasonal period set by the Commission, as distinguished from wages payable for employment before or after such seasonal period.

Prior to June thirtieth each year, a written determination declaring the employer to be seasonal and specifying the period of seasonal operation shall be forwarded to the employer involved. Notice of the determined season shall be forwarded to any representative of individuals in the employment of such employer and of whom the Commission has knowledge. Within fifteen days after the date of mailing or handing such written declaration, the employer or other interested party may appeal from such determination. An appeal shall be made to the Commission stating therein why the determination is appealed. After affording the parties a reasonable opportunity to submit briefs with respect to the determination appealed from, the Commission may affirm, modify, or set aside such determination, and such action of the Commission shall be deemed conclusive unless further appeal is initiated as provided in Section 51-5-7 (h) herein.

(3) Seasonal Employment Defined. 'Seasonal employment' means all employment for a seasonal

employer or operating unit within the season determined by the Commission as its operating season. All wages payable by a seasonal employer within such operating season shall be deemed seasonal wages.

(4) Operating Unit. For the purposes of this Act relating to seasonal employment, an 'operating unit' is any unit of an employer's business which frequently is conducted as a separate and independent operation.

(5) Seasonal Worker. 'Seasonal worker' means an individual who has base period wage credits of which at least eighty percentum have been earned in seasonal employment.

(6) Benefit Payments to Seasonal Workers. When the Commission has designated the operations of an employer or an operating unit as seasonal, then benefits shall be payable to seasonal workers employed thereby only on account of unemployment occurring during the regular period of such seasonal employment as designated in Section 51-5-2 (c) (2)."

Appendix "J"

AMENDED BENEFIT REGULATION NO. 10
EFFECTIVE JUNE 29, 1953.

EMPLOYMENT SECURITY COMMISSION OF ALASKA

REGULATION 10. ESTABLISHING SEASONAL PERIODS AND PROVIDING FOR PAYMENT OF BENEFITS TO SEASONAL WORKERS.

Section 51-5-2 (c) Alaska Compiled Laws Annotated 1949 as amended by Section 7, Chapter 99, Laws of 1953, provides:

> "(2) * * * When the Commission has finally determined seasonal periods, it shall issue a regulation specifying the seasonal periods during which benefits shall be payable to eligible beneficiaries for unemployment occurring within the benefit year affected by such regulation. * * *"

The Commission accordingly prescribes:

I. SEASONAL PERIODS FOR THE CALENDAR YEAR 1953 FOR CERTAIN EMPLOYERS ENGAGED IN THE CANNING OF SALMON TAKEN IN THE OPERATING AREA DESIGNATED.

OPERATING AREA[1]	SEASONAL INCLUSIVE DATES	SEASONAL CODE
Yukon	May 30 to September 5	19
Bristol Bay	June 20 to August 1	20
Alaska Peninsula and Cook Inlet	May 23 to August 8	21
Chignik and Kodiak	June 13 to August 15	22
Resurrection Bay	June 27 to October 3	23
Prince William Sound	July 12 to August 29	29
Copper River and Bering River	April 25 to September 26	24
Yakutat	May 30 to October 3	25
Southeastern:		
Icy Straight, Eastern (except Taku River & Port Snettisham) & Western Districts	June 13 to August 29	27
Stikine District, and Taku River and Port Snettisham in Eastern District	(May 2 to June 12	26
	(June 13 to August 29	27
Sumner Strait, Clarence Straight South Prince of Wales Island and Southern districts	(August 30 to October 3	28
	July 12 to August 29	29

[1]Operating Areas herein are as more particularly described in regulatory announcements of the U. S. Fish & Wildlife Service.

II. REPORTING BY SEASONAL EMPLOYERS:

Employers having been determined by the Commission to be seasonal employers and so notified shall report the amount of wages payable to individuals in their employ within the inclusive dates of the seasonal period established by the Commission as distinguished from wages payable for employment before or after such established season.

III. BENEFIT PAYMENTS TO SEASONAL WORKERS.

A seasonal worker is one who has base period wage credits of which at least eighty percentum have been earned in seasonal employment. Benefits shall be payable to seasonal workers only on account of unemployment occurring during the seasonal period applicable to such unemployment as designated in paragraph I herein.

Pursuant to the appropriate provisions of the Alaska Employment Security Law (Sections 51-5-1 to 20 ACLA 1949, as amended) and in accordance with the authority vested in me, I, John T. McLaughlin, the duly qualified and acting executive director of the Employment Security Commission of Alaska, do hereby adopt the foregoing regulation, designated as Regulation 10, and prescribe that the same shall take effect July 5, 1953, superseding former Regulation 10 dated October 16, 1952.

Dated at Juneau, Alaska, this twenty-ninth day of June, 1953.

JOHN T. McLAUGHLIN,
Executive Director, Employment
Security Commission of Alaska.

Appendix "K"

PERTINENT EXCERPTS FROM 1953 ALASKA SENATE JOURNAL, PAGES 923, 924, 60TH DAY.

"Thereupon Senator Engstrom asked unanimous consent that the Senate again pass HOUSE BILL NO. 128, notwithstanding the Governor's veto. Without objection it was so ordered.

The question being, 'Shall HOUSE BILL NO. 128, notwithstanding the Governor's veto, pass the Senate?', the roll was called with the following result:

Yeas, 13—***

Nays, 3—***

And so the Bill passed, notwithstanding the Governor's veto, and the House was so notified.

Senator Engstrom asked unanimous consent that the senate again pass HOUSE BILL NO. 129, notwithstanding the Governor's veto. Without objection, it was so ordered.

The question being, 'Shall HOUSE BILL NO. 129, notwithstanding the Governor's veto, pass the Senate?', the roll was called with the following result:

Yeas, 14—***

Nays, 2—***

And so the Bill passed, nothwithstanding the Governor's veto, and the House was so notified."

Appendix "L"

CERTIFICATION OF APPOINTMENTS TO EMPLOYMENT SECURITY COMMISSION OF ALASKA.

I, Waino E. Hendrickson, Secretary of Alaska, hereby certify that Governor B. Frank Heintzleman has appointed the below named members of the Employment Security Commission of Alaska in compliances with the provisions of Chapter 83, Session Laws of Alaska, 1953.

R. L. Jernberg, Box 893, Ketchikan, Alaska, Democrat, representing Management, appointed June 24, 1953, for term ending February 1, 1961.
Lyle E. Anderson, 1010 S Street, Anchorage, Alaska, Republican, representing management, appointed June 24, 1953, for term ending February 1, 1959.
Robert Dixon, Box 609, Fairbanks, Alaska, Democrat, representing Labor, appointed June 24, 1953, for term ending February 1, 1955.
Fred Williamson, Box 1963, Anchorage, Alaska, Republican representing Labor, appointed June 24, 1953, for term ending February 1, 1957.

s/WAINO E. HENDRICKSON
Secretary of Alaska.

THE SEAL OF THE TERRITORY OF ALASKA.